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COMMENTS REQUESTED IN CONNECTION WITH EXPEDITED RECONSIDERATION OF INTERPRETATION OF SECTION 272(e)(4)

CC Docket No. 96-149

In a recent rulemaking, the Commission construed the scope of section 272(e)(4) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.¹ The Commission concluded that section 272(e)(4) is not a grant of authority for a Bell Operating Company (BOC) to provide interLATA services prior to receiving section 271 authority.² The Commission further concluded that section 272(e)(4) is not a grant of authority for a BOC to provide interLATA services, including wholesale interLATA services provided to its interLATA affiliate, after receiving section 271 authority.³ Following the rulemaking, certain BOCs filed a motion with the United States Court of Appeals for the District of Columbia Circuit seeking summary reversal of the Commission's interpretation of section 272(e)(4).⁴ The Commission responded that, among other things, some of the arguments that the BOCs advanced in their motion for summary reversal had not been clearly presented to the Commission in the rulemaking proceeding.⁵ The Commission, therefore, asked that it be given the opportunity to reconsider, in light of these arguments, its interpretation of section 272(e)(4) prior to judicial review of those arguments. On March 31, 1997, the court granted the Commission's request, concluding that "[t]he merits of the parties' positions are not so clear as to warrant summary action."⁶ The court noted that it expects that "the Commission will adhere to its proposal to complete any further

¹ See 47 U.S.C. § 274(e)(4).

² See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-489, paras. 261-67 (Dec. 24, 1996).

³ See *id.*

⁴ See *Bell Atlantic v. FCC*, No. 97-1067, Motion of Bell Atlantic and Pacific Telesis for Summary Reversal or for Expedition (D.C. Cir. filed Feb. 11, 1997).

⁵ See *id.*, Motion of Federal Communications Commission For Remand to Consider Issues (D.C. Cir. filed Feb. 25, 1997).

⁶ See *id.*, Order (D.C. Cir. Mar. 31, 1997) (citation omitted).

proceedings and adopt a revised order within 90 days of the date of this order."⁷

In this Public Notice, to aid the Commission in meeting its commitment to reconsider promptly its interpretation of section 272(e)(4), the Common Carrier Bureau seeks comment on certain specific issues relating to section 272(e)(4). Parties should feel free to address any of the other issues previously addressed before the Commission or the court that are relevant to this inquiry.

1. Section 272(a) states, among other things, that BOCs "may not provide" directly "[o]riginat[i]on of [in-region] interLATA telecommunications services."⁸ Before the court, the BOCs argued that their reading of section 272(e)(4) does not conflict with section 272(a) because when a BOC provides in-region interLATA telecommunications services on a wholesale basis, it does not "[o]riginat[e]" such services. We seek comment on what precisely it means to "originate" an interLATA telecommunications service. Is "origination" strictly a retail concept? Commenting parties should also discuss the legal implications, if any, of the fact that section 271(b)(1), which prohibits a BOC or its affiliate from providing "interLATA services originating in any of its in-region States" prior to FCC approval,⁹ also uses a form of the term "originate."

2. What is the legal significance, if any, of the fact that section 272(e)(4) applies to *intra*LATA services and facilities as well as interLATA services and facilities? Before the court, for example, AT&T argued that the use of the term "intraLATA" demonstrates that section 272(e)(4) is not a grant of authority because, among other things, "a BOC needs no grant of federal statutory authority to provide *intra*LATA services."¹⁰

3. Are the principal concerns that underlie the separate affiliate requirement of section 272 -- discrimination and cost misallocation by a BOC -- less serious in the context of the wholesale provisioning of in-region interLATA services to affiliates than in the context of the direct retail provisioning of such services, at least where, as here, any such provisioning is required to take place in a non-discriminatory manner? If they are less serious, are they nonetheless serious enough to justify, as a policy matter, prohibiting such wholesale provisioning? Of what relevance, if any, is the fact that there was no exception to the interLATA services restriction contained in the Modified Final Judgment for wholesale interLATA services provided on a non-discriminatory basis,¹¹ or that there presently is no wholesale interLATA services exception to section 271's prohibition on the provision of in-region interLATA services prior to FCC approval? At the same time, of what relevance, if any, is the fact that once a BOC has received section 271 approval and its interLATA affiliate is permitted to provide in-region

⁷ See *id.*

⁸ 47 U.S.C. § 272(a).

⁹ 47 U.S.C. § 271(b)(1).

¹⁰ See *Bell Atlantic v. FCC*, No. 97-1067, AT&T's Response to Motion For Summary Reversal or Expedition 11 (D.C. Cir. filed Feb. 25, 1997).

¹¹ See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

interLATA services, the 1996 Act also allows the BOC to provide its interLATA affiliate various wholesale services and facilities, such as wholesale access services and wholesale access to unbundled network elements, so long as the BOC does so in a non-discriminatory way and in arm's length transactions? What is the policy justification for not permitting the BOC to provide, in addition, wholesale interLATA services to its affiliate?

4. Does the extent of concern for discrimination and cost misallocation depend, at least in part, on the particular kind of in-region wholesale interLATA service a BOC seeks to offer? For example, does the extent of concern differ depending on whether the wholesale service being offered is a bundled end-to-end interLATA service or a interLATA service that merely transmits traffic from a point of presence in one LATA to a point of presence in another LATA? How would the non-discrimination requirement in section 272(e)(4) apply to these different kinds of wholesale interLATA services? Are there some kinds of services that, in practice, could not be provided in a non-discriminatory manner? In their comments, BOCs should clarify precisely what kind of wholesale interLATA service they would seek to provide, if any, using the excess capacity on their official services networks.

Interested parties should file an original and two copies of their comments by **April 17, 1997**, and reply comments by **April 24, 1997**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D. C. 20554. A copy should also be sent to Janice Myles, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D. C. 20554, and to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D. C. 20037. Parties filing comments and reply comments should include the Commission docket number, CC Docket No. 96-149, on their pleadings. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D. C. 20554.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216.

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